

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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ORIGINAL

74-1613

(41,606)

To be argued by
SUSAN S. BELKIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1613

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF MUNICIPAL APPELLEE



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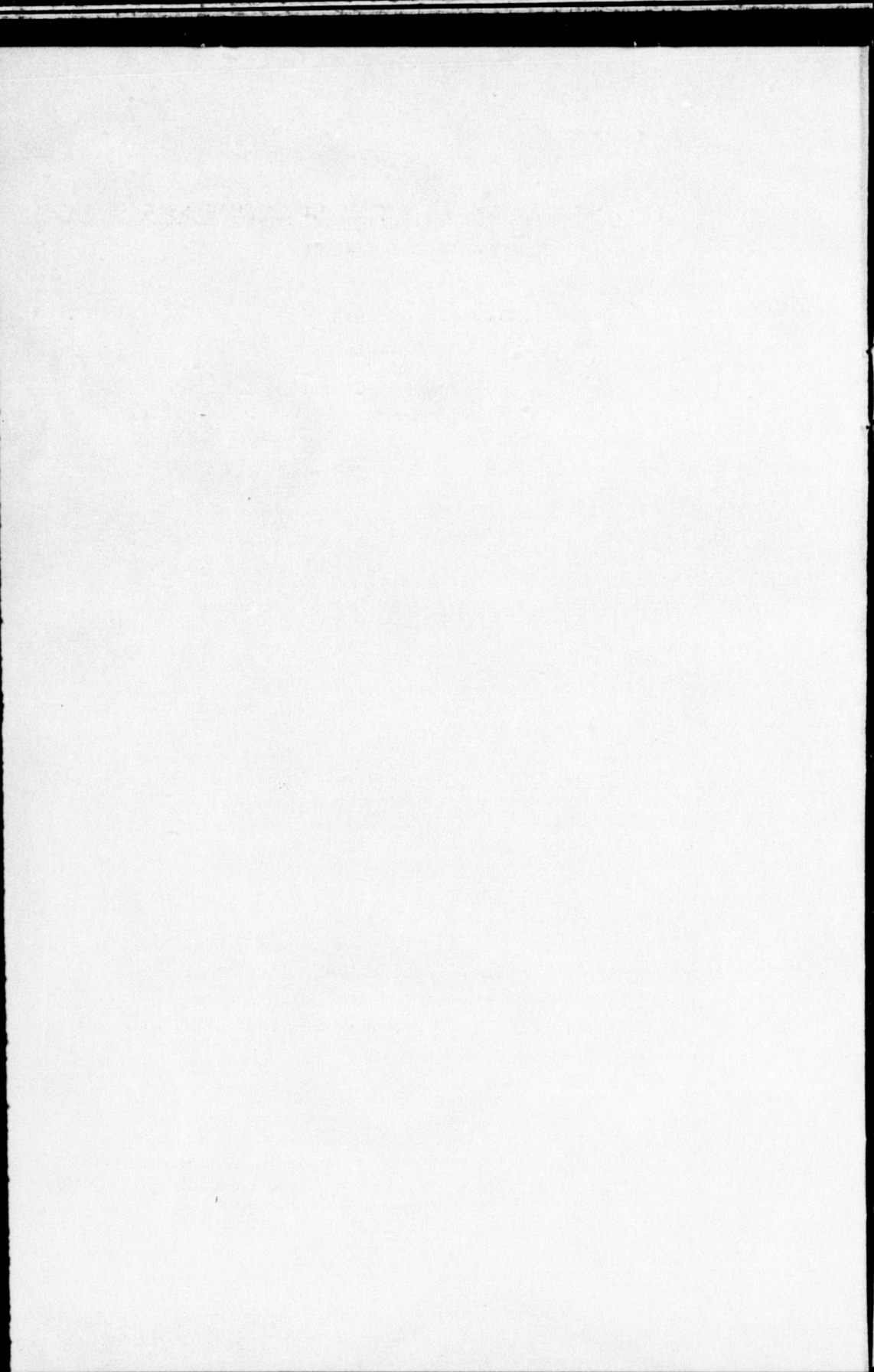
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Statement

This is an appeal from orders of the United States District Court for the Southern District of New York (BONSAL, J.), entered on May 30, 1973, and May 20, 1974. The first of these orders granted defendant Wyman's motion to dismiss the complaint as to him. The second granted defendant Goldberg's motion to dismiss the complaint as to him.*

* We would note that appellant's Notice of Appeal is dated March 28, 1974, which is approximately two months before the order dismissing this action as against the defendant Goldberg was entered in the District Court. This would appear at least irregular under Rule 4(a) of the Federal Rules of Appellate Procedure, and may possibly constitute a jurisdictional bar to this appeal.

Pursuant to leave granted by this Court, this appeal is being heard on the original record in the District Court.

Questions Presented

1. Did the District Court, in the exercise of its equity powers, abuse its discretion in holding that it would not order the municipal defendant, Goldberg, to pay to plaintiff retroactive benefits allegedly wrongfully withheld?

2. Was the defendant Goldberg in his actions challenged herein, wherein he was administering a New York State social welfare district, sufficiently a State officer to warrant the conclusion that this action, insofar as it seeks money damages, is barred by the Eleventh Amendment of the United States Constitution?

Facts

(1)

Plaintiff, Fermina Montez, on her own behalf, and on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted this civil action for declaratory and injunctive relief pursuant to 42 U. S. C. Section 1983, on October 31, 1969. Named as defendants were George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York. Plaintiff sought relief from the enforcement of § 353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N. Y. C. R. R. 353.3(a)(2)), which regulation (since repealed) required that the income of a stepparent in excess of his own needs as defined by the State be applied against the needs of his stepchildren in their application for assistance. Plaintiff in her complaint contended that this regulation arbitrarily assumed that the income of the stepparent was available for the support of his stepchildren and that the enforcement of the regulation constituted a violation of the Due Process and Equal Protection clauses

of the Fourteenth Amendment, the right to privacy, and the Social Security Act (42 U. S. C. 601 et seq.).

The complaint alleges the following: Plaintiff Fermina Montez is the mother of Jose and Armando Montez, 12 and 11 years of age, respectively. The children's father, Jose Montez, stopped all support of the children in June 1968. Plaintiff was forced to leave her employment in June of 1968 to look after her children, who had dropped out of school. Plaintiff divorced Jose Montez in October 1968. Montez's present "whereabouts" was not known. In January of 1969 plaintiff married Luis Perdomo. He was unable to contribute to the children's support other than the cost of shelter. Plaintiff received public assistance under the Aid to Families with Dependent Children (AFDC) program on behalf of the two Montez children. In February of 1969, she received a "Notice of Intent to Suspend Public Assistance". Aid was cut off as of February 1, 1969.* At a hearing held on March 11, 1969, plaintiff was required to report her husband's income, to be figured into the calculation of her aid. On April 2, 1969, plaintiff requested a hearing to review her treatment. Plaintiff claimed that there was no response to this request.

The plaintiff by her complaint sought the issuance of a temporary and permanent injunction, the convening of a 3-Judge Court under 28 U. S. C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U. S. C. § 2202, and retroactive payments. Jurisdiction was alleged under 28 U. S. C. §§ 1343(3) and 1343(4).

* It should be noted that plaintiff's aid was terminated on February 11, 1969 because of her marriage. Assistance was resumed on February 19, 1969. A pre-termination review was held on March 11, 1969 because Mrs. Perdomo refused to allow the Department of Social Services to complete its investigation. As a result of this review aid was again terminated on March 24, 1969. Plaintiff reapplied for assistance on March 25, 1969, and since her husband had signed an application for public assistance, the aid was restored on April 1, 1969. See affidavit of Eugene E. Coppola, dated December 5, 1969.

On December 11, 1969, Judge FRANKEL denied the plaintiff's application for a temporary restraining order and the convening of a 3-Judge Court. He endorsed the moving papers:

"Plaintiff concedes there is no dispute as to her present or future entitlement, but only an open question as to *past* allowances. The basis for this motion being concededly absent, it is denied. So ordered."

(2)

On May 27, 1970, Judge METZNER denied an application by one Delia Cancel to intervene in the action, suggesting that she commence an entirely new action. An action was subsequently instituted challenging the aforementioned state regulation. *Cancel v. Wyman*, 321 F. Supp. 528 (S. D. N. Y., 1970). On August 24, 1970, Judge COOPER denied Cancel's application for the convening of a 3-Judge Court on the basis that no substantial constitutional question was raised. Judge COOPER permitted maintenance of a class action, and left for trial the issue as to the existence of a conflict between state and federal regulations. An appeal of this decision was subsequently dismissed. *Cancel v. Wyman*, 441 F. 2d 553 (2d Cir., 1971).

(3)

In the present case, on February 25, 1971, appellant moved for summary judgment to recover retroactive payments allegedly due her for the period from February 1, 1969, through December 31, 1969, in the amount of \$809.20. On May 5, 1971, Judge METZNER denied the motion, stating:

"In view of Judge Frankel's decision, this action has been limited to recovery by plaintiff of allegedly past due deficiencies during a specified period . . .

I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations (18 N. Y. C. R. R. § 353.3(a)(2)(i) and 45 C. F. R. § 203.1) are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact it would appear that the result would be contrary to plaintiff's contention.

Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

On September 20, 1972, an order was entered by the District Court for the Southern District of New York dismissing the action for lack of prosecution. However, on motion of the plaintiff, this order was vacated on January 18, 1973. On February 14, 1973, defendant Wyman moved pursuant to Rule 12, Fed. R. Civ. Pr., to dismiss the complaint as to him for lack of jurisdiction, and pursuant to Rule 15, Fed. R. Civ. Pr., to amend his answer to include the Eleventh Amendment as a bar to retroactive payments as sought by plaintiff. On May 7, 1973, defendant Wyman's motion to dismiss the complaint was granted. Judge BONSAL wrote:

"In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her A. F. D. C. payments.

... Under the Eleventh Amendment this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in A. F. D. C. payments (citing cases)."

(4)

On December 17, 1973, defendant Goldberg moved pursuant to Rule 12(b)(1) and (6) Fed. R. Civ. Pr., for an order dismissing the complaint as to him on the grounds that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief might be granted.

Plaintiff had originally contended, on the basis of the affidavits filed with respect to her earlier motion for summary judgment, in 1972, that she was entitled to a total of \$2,384.70 in public assistance from February 1, 1969 through December 31, 1969, of which amount she claims to have received \$1,575.50, leaving a balance of \$809.20. At the time of defendants' motion to dismiss, plaintiff claimed that she was entitled to a total of \$3,370.82 for the year 1969, with a balance allegedly still due of \$1,795.32.

In an affidavit in support of defendant Goldberg's motion to dismiss, Gayle Redford, an Assistant Corporation Counsel, contended that plaintiff's calculations are inaccurate in that they do not take into account the fact that her husband, Mr. Perdomo was placed on plaintiff's welfare budget in April 1969 and that his income was included in the computation of plaintiff's need for the following nine month period of 1969. Moreover, the calculations do not accurately reflect the extent to which Perdomo's income should have been applied in determining his and the plaintiff's welfare benefits.

The cancelled welfare checks submitted by defendant Goldberg, indicate that from April 1, 1969, through December 31, 1969, virtually every check under case number 2769360 was issued to Luis Perdomo; only two totalling \$46.00 were issued to plaintiff. The checks issued to Luis Perdomo supplemented his monthly income of \$278.00. This income should have been applied in calculating the benefits due Perdomo and, at the very least, plaintiff (and their son Luis), during the 9 months in which they were on the same welfare budget. These earnings totalled \$2,502.00 ($\278.00×9) from April 1, 1969 through December 31, 1969. Despite this income, plaintiff claimed that her husband was giving her only about \$100 a month.

The affidavit in support of defendant Goldberg's motion showed that no money was owed to the plaintiff. While plaintiff claimed that, from February 1, 1969 through December 31, 1969, she received only \$1,575.50 in assistance, the cancelled checks submitted by defendant Goldberg clearly indicated that plaintiff and her husband were actually paid \$2,051.45 during that period under case number 2769360.

In addition, payments totalling \$1,203.44 were paid by the Department of Social Service under the medicaid program for hospitalization of plaintiff in connection with her pregnancy and the birth of Luis Perdomo in November, 1969. This child is the son of plaintiff and Luis Perdomo. Even if Perdomo's salary

had not been applied in calculating welfare benefits due plaintiff and her husband, then it should have been applied to the hospital bills incurred by the plaintiff. This was not done.

Opinion Below

Judge BONSAL granted defendant GOLDBERG's motion to dismiss the complaint, treated as a motion for summary judgment. In a decision dated March 25, 1974, Judge BONSAL wrote:

"... Under New York Social Welfare Law § 101 (1966) Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. If Mr. Perdomo is included in the calculations, plaintiff would have been entitled to a total of \$2,025.18 in public assistance benefits for the year 1969. The affidavits, however, show that plaintiff and her husband received \$2,051.45, which is of course more than this amount. In any event, the award of retroactive benefits for alleged past deficiencies in AFDC payments lies within the federal courts' equity powers. See *Rothstein v. Wyman*, 467 F. 2d 226 (2d Cir. 1972), *cert. denied*, 411 U. S. 921 (1973). On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments."*

Applicable New York State Statutes and Regulations

Social Services Law

"§ 17. Powers and duties of the commissioner

The commissioner shall

(a) determine the policies and principles upon which public assistance, services and care shall be provided

* For the convenience of this Court, Judge BONSAL's opinion in its entirety is annexed as an appendix to this brief.

within the state both by the state itself and by the local governmental units within the limits hereinafter prescribed in this chapter;

(b) make known his policies and principles to local social services officials and to public and private institutions and welfare agencies subject to his regulatory and advisory powers;

(c) in consultation with the civil service commission, establish minimum qualifications for positions in local social services departments and classify such positions according to differing capabilities, skills, responsibilities and education suitable to the various phases of welfare administration, not inconsistent with the standards and guidelines of a duly authorized federal agency, having due regard for recruitment of personnel and the requirements and varying types of communities within the state. Notwithstanding any inconsistent provision of law, rule or regulation, when (i) a position is vacant and not filled for a continuous period of three months, and (ii) provided that no person meeting all the prescribed minimum qualifications is available therefor, the local social services commissioner may, if in accordance with federal standards, waive those qualifications which he deems least essential for such position and make a provisional appointment of a person otherwise qualified therefor;

(d) report at least once a year to the governor and the legislature with respect to the affairs of the department and the status of welfare programs in the state and make recommendation for the improvement and development of welfare programs;

(e) exercise such other powers and perform such other duties as may be imposed by law."

"§ 20. Powers and duties of the department

3. The department is authorized:

(a) to supervise local social services departments and in exercising such supervision the department shall approve or disapprove rules, regulations and procedures made by local social services officials within thirty days after filing of same with the commissioner; such rules, regulations and procedures shall become operative im-

mediately upon approval or on the thirtieth day after such submission to the commissioner unless the commissioner shall specifically disapprove said rule, regulation or procedure as being inconsistent with law or regulations of the department;

* * *

“§ 56. City public welfare districts

The cities of New York, Oswego, Poughkeepsie and Auburn shall have all the powers and duties of a public welfare district insofar as consistent with the provisions of the special and local laws relating to such cities. The officers thereof charged with the administration of public assistance and care shall have additional powers and duties of a commissioner of public welfare not inconsistent with the laws relating to said cities.

* * *

“§ 61. Public welfare districts

For the purpose of administration of public assistance and care the state shall be divided into county and city public welfare districts as follows:

1. The cities of New York, Oswego, Poughkeepsie and Auburn are each hereby constituted a city public welfare district.

2. * * *

3. Each of the counties of the state not included in subdivisions one and two of this section is hereby constituted a county public welfare district.”

“§ 62. Responsibility for public assistance and care

1. Subject to reimbursement in the cases hereinafter provided for, each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.”

"§ 101. Liability of relatives to support

1. The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children.

2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official."

"New York Code of Rules and Regulations Social Welfare, 18 N. Y. C. R. R. § 353.3(a) (2)

All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refuses to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own need and any surplus against the needs of his dependents." (repealed, June 1970).

POINT I

The District Court properly granted Defendant Goldberg's motion for dismissal, treated as a motion for summary judgment.

(1)

The only issue before the District Court was whether plaintiff is entitled to retroactive payments for alleged past deficien-

cies in her AFDC payments. Plaintiff had originally contended, on the basis of the affidavits filed with respect to her earlier motion for summary judgment, that she was entitled to a total of \$2,384.70 in public assistance from February 1, 1969, through December 31, 1969, of which amount she claimed that she received \$1,575.50, leaving a balance of \$809.20. Subsequently, plaintiff claimed that she was entitled to a total of \$3,370.82 for the year 1969, with a balance allegedly still due of \$1,795.32.

Defendant Goldberg made a motion to dismiss the complaint as to him on the ground that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief might be granted. Defendant Goldberg's motion was accompanied by an affidavit by Assistant Corporation Counsel, Gayle Redford, and photocopies of cancelled welfare checks issued to the plaintiff and her husband for 1969. The affidavit and the checks conclusively proved that, while plaintiff claimed in her complaint that she received only \$1,575.50 in assistance from February 1, 1969 through December 31, 1969, plaintiff and her husband were actually paid \$2,051.45 during that period under case number 2769360. It was also affirmed that plaintiff's figures for amounts allegedly due were incorrect in that they did not take into account the fact that Mr. Perdomo was placed on plaintiff's welfare budget in April 1969 and that his income was included in the computation of plaintiff's need during this period.

The decision of the District Court stated that under New York Social Welfare Law § 101 (1966), Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. Judge BONSALE's opinion indicated that the plaintiff was very likely overpaid for the year 1969. However, the decision did not expressly rest on this ground. The Court instead concluded that: "On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments." The Court did not discuss defendant Goldberg's asserted Eleventh Amendment defense.

(2)

Under the Federal Rules of Civil Procedure a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to be converted into motion for summary judgment whenever matters outside the pleadings are presented to and accepted by the Court.

In the instant case defendant Goldberg's motion to dismiss was accompanied by an affidavit and cancelled checks which, we believe, conclusively showed that the plaintiff was not in fact owed any additional money, since she was paid \$2,051.45 from February 1, 1969 through December 31, 1969 under case number 2769360.* The District Court's opinion does not purport to rest its decision on this ground. However, the Court did appear to accept the defendant Goldberg's figures as accurate. Based upon this showing by the defendant Goldberg, and the failure of plaintiff, in the court below as well as in this Court, to present any convincing contrary figures, we submit that this was an *a fortiori* case for the trial court's declining to exercise its discretion to refuse equitable relief.

It is accepted that under *Rothstein v. Wyman*, 467 F. 2d 226 (2nd Cir., 1972), *cert. denied*, 411 U. S. 921 (1973), the Court's equity jurisdiction may be used to determine if retroactive benefits are recoverable in cases involving categorical aid under the Social Security Act. In *Rothstein*, a case brought by recipients of Aid to the Aged Blind and Disabled from the seven counties surrounding New York City challenging Social Services Law § 131-a, the District Court enjoined the defendants from enforcement of that statute and awarded retroactive benefits.

* In this Circuit affidavits and exhibits have been accepted on Rule 12(b)(6) motions, and when so accepted the motion becomes one for summary judgment. See, e.g., *Thompson v. New York Central R. R. Co.*, 361 F. 2d 137 (2nd Cir., 1966) (affidavits); *Larsen v. American Airlines Inc.*, 313 F. 2d 599 (2nd Cir., 1962) (affidavit); *General Tire and Rubber Co. v. Jefferson Chem. Co.*, 46 F. R. D. 607 (S. D. N. Y., 1969) (exhibits); *Madeirense DO Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F. 2d 399 (2nd Cir., 1945) *cert. den.* 325 U. S. 861 (1945) (exhibits-letter).

On appeal, this Court held that the award of retroactive payments by the District Court was not a proper exercise of the District Court's equitable powers. This Court said that in wielding equity power the Court must weigh competing claims and determine where a preponderance of the equities lies.

In this case, plaintiff has not demonstrated on what basis the Court had any discretion to exercise its equitable power. The defendant Goldberg's calculations as shown by the affidavit and cancelled checks were not successfully challenged by plaintiff. Since there was apparently no money owed to the plaintiff, under any construction of the equities involved in this case, the District Court properly found that there was no basis upon which to exercise its equity jurisdiction.

POINT II

The action against the municipal defendant is barred by the Eleventh Amendment to the United States Constitution.

(1)

In a decision dated May 7, 1973, Judge BONSAI held that this action against the state defendant should be dismissed, on the ground that the District Court did not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in AFDC payments. This decision was pursuant to *Rothstein v. Wyman, supra*, which held that, although injunctive relief was properly granted in a finding that geographical differential was unjustified by cost factors and in conflict with the Social Security Act, an award of retroactive benefits was an improper exercise of equity jurisdiction *and* was barred by the Eleventh Amendment of the United States Constitution.

Recently the United States Supreme Court in *Edelman v. Jordan*, — U. S. —, 39 L. Ed. 2d 662 (1974), held that a federal court's remedial power, consistent with the Eleventh

Amendment is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from a state treasury. It is submitted that retroactive payments may not be imposed on either defendant Wyman or defendant Goldberg in the present case.

(2)

We do not here question that if a municipality is functioning in an autonomous manner within its delegated sphere of authority it is not immune from suit under the Eleventh Amendment to the United States Constitution. See, e.g., *Port of Seattle v. Oregon W. R. R.*, 255 U. S. 56, 70 (1921) (suit to quiet title); *Graham v. Folson*, 200 U. S. 248 (1906) (liability on bonds); *Lincoln County v. Luning*, 133 U. S. 529 (1890) (liability on bonds issued by the county under an empowering state statute); *Martcham v. City of Newport News*, 292 F. 2d 711 (4th Cir., 1961) (tort liability); *Universal Surety Co. v. Lescher and Mahoney*, 340 F. Supp. 303 (N. Ariz., 1972) (liability on a county contract); *Cooper v. Westchester County*, 42 F. Supp. 1 (S. D. N. Y., 1941) (patent infringement).

However, a municipality may be considered a state defendant for the purposes of the Eleventh Amendment if it is acting as the *alter ego* of the State in a particular case. *Moor v. County of Alameda*, 411 U. S. 693, 717-722 (1973).

(3)

It is clear that defendant Goldberg was in this case functioning as an agent of the State, and enforcing a State regulation. New York State Social Services Law § 61 divides the State of New York, for purposes of public welfare, into county and city public welfare districts. The City of New York is a public welfare district (*Id.*). The purpose stated in the statute for this division into districts is "the purpose of administration". By this, presumably, is meant administrative convenience or efficiency. Under Section 62 of the Social Services law each public welfare district, subject to the reimbursement, is responsible for

the assistance and care of any person within its jurisdiction who is in need of public assistance. However, the local public welfare districts do not operate autonomously. The New York State Commissioner of Social Services determines the policies and principles upon which public assistance, services and care is provided within the State. Social Services Law § 17. Although the local social services departments may implement some of their own rules, regulations and procedures, these must be approved by the New York State Department of Social Services. Social Services Law § 20.*

A recent Supreme Court decision involving the Social Security Act has apparently considered county officials to be "state officials" for Eleventh Amendment purposes, when the case involved challenges to state statutes or regulations as enforced by these officials. *Edelman v. Jordan*, — U. S. —, 39 L. Ed. 2d 662 (1974). In this case two of the four defendants were, it appears, county officials, *i.e.*, the director of the Cook County Department of Public Aid and the comptroller of Cook County. See 39 L. Ed. 2d at 667. Nonetheless, the Court treated all defendants as "state officials" and therefore immune from suit under the Eleventh Amendment since they were administering the federal-state programs of Aid to the Aged, Blind and Disabled pursuant to the challenged state regulations.

Defendant Goldberg allegedly underpaid plaintiff pursuant to a regulation of the State Social Services Department, 18 N. Y. C. R. R. § 353.3(a)(2). This regulation was promulgated to enforce a State statute which requires a stepparent to support an AFDC recipient's minor children. Social Services Law § 101. This was not a local policy. The regulation in question, 18 N. Y. C. R. R. § 353.3(a)(2), which has since been repealed, was a State regulation not subject to local control.

* See generally, discussing the relationship between the State and City under New York's welfare program, *City of New York v. Richardson*, 473 F. 2d 923, 927 (2d Cir.), *cert. denied*, 412 U. S. 950 (1973), decision on remand to 3-judge court, — F. Supp. — (S. D. N. Y., 1974).

Defendant Goldberg had no discretion whether or not to enforce this State regulation.

Griffin v. School Board, 377 U. S. 218 (1964), cited in the *Edelman* case (and noted by the plaintiff, App. Br., p. 3) is, then, not in point. *Griffin* involved county policies executed by county officials. Both *Edelman* and the present case differ from *Griffin*, since both of these cases involve challenges to state statutes and regulations enforced by municipal (county or city) officials. On the facts of the instant case it should be held, as it was apparently held in *Edelman*, that the defendant local official administering such a State program is immune from a suit for damages under the Eleventh Amendment.

CONCLUSION

The judgment appealed from should be affirmed, with costs.

July 26, 1974.

Respectfully submitted,

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Jay David Gayner, a third-year law student at Boston University School of Law, assisted in the preparation of this brief.

APPENDIX

**Memorandum of District Judge Bonsal,
dated March 25, 1974**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 4773 #40500

FERMINA MONTEZ, on her own behalf and on behalf of her
infant children, JOSE MIRINO MONTEZ and ARMANDO MON-
TEZ, on behalf of themselves and all others similarly situated,
Plaintiffs,

against

GEORGE K. WYMAN, individually and as Commissioner of the
Department of Social Services of the State of New York and
JACK R. GOLDBERG, individually and as Commissioner of
the Department of Social Services of the City of New York,
Defendants.

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Attorney for Defendant Goldberg

GAYLE S. REDFORD, ESQ.
of Counsel

*Memorandum of District Judge Bonsal,
dated March 25, 1974*

MEMORANDUM

BONSAL, D. J.

Plaintiff, on her own behalf, on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted this action on October 31, 1969 against defendants, George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York, seeking relief from the enforcement of § 353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N. Y. C. R. R. § 353.3(a)(2)), which requires that the income of a stepparent in excess of his own needs as defined by the State be applied against the needs of his stepchildren in their application for assistance. The plaintiff contends that this regulation arbitrarily assumes that the income of the stepparent is available for the support of his stepchildren and that the enforcement of this regulation constitutes a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the right to privacy, and the Social Security Act (42 U. S. C. §§ 601 et seq.) and the regulations promulgated thereunder (45 C. F. R. §§ 201 et seq.).

The complaint alleges that plaintiff, Fermina Montez, is the mother of Jose and Armando Montez, 12 and 11 years of age respectively; that the children's father, Jose Montez, stopped all support of the children in June of 1968; that plaintiff was forced to leave her employment in June of 1968 to look after her children, who had dropped out of school; that Fermina Montez divorced Jose Montez in October of 1968; that Jose Montez's present whereabouts is unknown, that Fermina Montez married Luis Perdomo in January of 1969; that Luis Perdomo is unable to contribute to the children's support other than the cost of shelter; that plaintiff, Fermina Montez, received public assistance under the Aid to Families with Dependent Children ("AFDC")

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program on behalf of the two Montez children; that this aid continued to February of 1969, when she received a "Notice of Intent to Suspend Public Assistance"; that aid was cut off as of February 1, 1969; that at a hearing held on March 11, 1969, plaintiff was required to report her husband's income, to be figured into the calculation of her aid; that on April 2, 1969, plaintiff requested a hearing to review her treatment; and that there was no response to this request. The complaint seeks the issuance of a temporary and permanent injunction, the convening of a 3-Judge Court under 28 U. S. C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U. S. C. § 2202, and retroactive payments. Jurisdiction is alleged under 28 U. S. C. §§ 1343(3) and 1343(4).

This action has had a varied course. On December 11, 1969, Judge Frankel denied the plaintiff's application for a temporary restraining order and the convening of a 3-Judge Court. He endorsed the moving papers:

"Plaintiff concedes there is no dispute as to her present or future entitlement, but only an open question as to *past* allowances. The basis for this motion being concededly absent, it is denied. So ordered."

On May 27, 1970, Judge Metzner denied an application by Delia Cancel to intervene as a plaintiff in the action, suggesting that she commence an entirely new action. A new action was commenced, and on August 24, 1970 Judge Cooper: denied plaintiff Cancel's application for the convening of a 3-Judge Court on the ground that no substantial constitutional issue was raised; denied defendants' motion to dismiss the complaint; and granted the plaintiff's motion for an order permitting the action to proceed as a class action under Rule 23, Fed. R. Civ. P. *Cancel v. Wyman*, 321 F. Supp. 528 (S. D. N. Y. 1970), *appeal dismissed*, 441 F. 2d 553 (2d Cir. 1971). That action has since been discontinued. 70 Civ. 2359 (S. D. N. Y. Stipulation and Order filed March 6, 1974) (Conner, J.).

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In the present case, on February 25, 1971 plaintiff moved for summary judgment to recover retroactive payments allegedly due her for the period from February 1, 1969 through December 31, 1969 in the amount of \$809.20. On May 5, 1971 Judge Metzner denied the motion, stating:

"I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations [18 N. Y. C. R. R. § 353.3(a)(2)(i) and 45 C. F. R. § 203.1] are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact, it would appear that the result would be contrary to plaintiff's contention. Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

On September 20, 1972 an order was entered by this Court dismissing the action for lack of prosecution. However, on motion of plaintiff this Order was vacated on January 18, 1973. On February 14, 1973 defendant Wyman moved pursuant to Rule 12, Fed. R. Civ. P. to dismiss the complaint as to him for lack of jurisdiction, and pursuant to Rule 15, Fed. R. Civ. P. to amend his answer to include the Eleventh Amendment as a bar to retroactive payments as sought by the plaintiff. On May 7, 1973 defendant Wyman's motion to dismiss the complaint was granted. This Court said:

"In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her AFDC payments.

... Under the Eleventh Amendment, this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in AFDC payments. [citing cases]."

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Defendant Goldberg now moves to dismiss the complaint as to him on the ground that the Court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief may be granted.

Plaintiff contends on the basis of the affidavits filed with respect to her earlier motion for summary judgment that she was entitled to a total of \$2,384.70 in public assistance from February 1, 1969 through December 31, 1969, of which amount she claims she received \$1,575.50, leaving a balance of \$809.20. Plaintiff now claims that she was entitled to a total of \$3,370.82 for the year 1969, with a balance allegedly still due of \$1,795.32. Defendant, however, contends on the basis of cancelled public assistance checks issued to plaintiff and to her husband, Mr. Perdomo, that they together received the sum of \$2,051.45 for the year 1969. And defendant also contends that plaintiff's figures of amounts allegedly due are incorrect in that they do not take account of the fact that Mr. Perdomo was placed on plaintiff's welfare budget in April, 1969 and that his income was included into the computation of plaintiff's need during this period.

Under New York Social Welfare Law § 101 (1966), Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. If Mr. Perdomo is included in the calculations, plaintiff would have been entitled to a total of \$2,025.18 in public assistance benefits for the year 1969. The affidavits, however, show that plaintiff and her husband received \$2,051.45, which is of course more than this amount. In any event, the award of retroactive benefits for alleged past deficiencies in AFDC payments lies within the federal courts' equity powers. See *Rothstein v. Wyman*, 467 F. 2d 226 (2d Cir. 1972), *cert. denied*, 411 U. S. 921 (1973). On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments. Accordingly, defendant's motion to dis-

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miss the complaint, treated as a motion for summary judgment,
is granted. See Rules 12(b) and 56, Fed. R. Civ. P.

Settle order on notice.

DUDLEY B. BONSALE
U. S. D. J.

Dated: New York, N. Y.
March 25, 1974.

(4538)

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

CARLOS M. RODRIGUEZ

being duly sworn, says that on the 1 day
of August 1974, he served the annexed Brief upon
Jonathan Weiss Esq., the attorney for the Plaintiff Appellants
herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said attorney at No. 2095 Bway in the
Borough of Man, City of New York, being the address within the State theretofore designated by
him for that purpose.

Sworn to before me, this

1 day of August 1974

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Carlos M Rodriguez

Form 323-50M-721047(72) 346

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